

THIS DISPOSITION IS  
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PRECEDENT OF THE TTAB

Mailed: September 16, 2004

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re American Sporting Goods Corporation

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Serial No. 76386745

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Michael A. Painter of Isaacman, Kaufman & Painter, A Professional Corporation, for American Sporting Goods Corporation.

Angela M. Micheli, Trademark Examining Attorney, Law Office 108  
(David E. Shallant, Managing Attorney).

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Before Hohein, Bucher and Holtzman, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Applicant, American Sporting Goods Corporation, has filed an application to register the mark ARCH ROCKER for "footwear."<sup>1</sup> The word ARCH is disclaimed.

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles

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<sup>1</sup> Serial No. 76386745, filed March 25, 2002, asserting dates of first use and first use in commerce of July, 1990.

the mark ROCKERS for "canvas and non-leather shoes"<sup>2</sup> as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Briefs have been filed. An oral hearing was not requested.

Here, as in any likelihood of confusion analysis, we look to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), giving particular attention to the factors most relevant to the case at hand, including the similarity of the marks and the relatedness of the goods. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

The goods in this case are legally identical; applicant's goods identified as "footwear" fully encompasses the canvas and non-leather shoes in the cited registration. Because the goods are legally identical, they must be deemed to travel in the same channels of trade and be sold to the same purchasers. *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910 (TTAB 2000). Under the circumstances, if these identical goods are offered under similar marks, confusion would be likely.

Thus, we turn our attention to the marks, keeping in mind that when marks would appear on identical goods, as in this case, the degree of similarity between the marks necessary to support a

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<sup>2</sup> Registration No. 1242899, issued June 21, 1983; renewed.

finding of likely confusion declines. Century 21 Real Estate v. Century Life, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Applicant argues that when applicant's and registrant's marks are properly viewed in their entirety, including consideration of the disclaimed word, ARCH, and the plural form of ROCKERS in registrant's mark, and in view of the weakness of the common portion of the marks, there is no likelihood of confusion.

Specifically, applicant contends that a " cursory review " of the Office records " amply illustrates the inclusion of numerous registrations of composite trademarks which consist of or include the word ROCKER and/or ROCKERS for designating goods in International Class 25." Brief, p. 2. Applicant has listed four registrations for marks containing "ROCKER" or "ROCKERS" without specifying the identification of goods and/or services therein or providing any other information contained in the registrations.<sup>3</sup> Applicant simply states in its brief that the marks in these registrations "designat[e] extensive lines of clothing products, including footwear." We note that in its response to the initial Office action, applicant indicated that only one of the

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<sup>3</sup> The examining attorney, in her brief, has objected to the list of third-party registrations as being unsupported by copies thereof. However, the objection is considered to have been waived. Although applicant had relied on this listing in its response to the initial Office action, the examining attorney did not object to, or even mention, the registrations in her final refusal. Accordingly, this evidence has been treated as if properly of record and considered for whatever probative value it may have.

registrations (Registration No. 2341638 for CLEVELAND ROCKERS)

"covers footwear." Response, p. 4.

Applicant concludes that given "the extensive number of marks registered in International Class 25" which include the word ROCKER or ROCKERS,

"...the terms making up the Appellant's mark and that set forth in the [cited] registration are in common use resulting in marks which are weak and therefore limited to a narrow scope of protection." Brief, p. 7.

To be clear, there is no evidence of use here. Third-party registrations are not evidence that the marks therein are in use or that the public is familiar with them. See *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973). Third-party registrations can be used to show that a particular mark or element of a mark has a suggestive or commonly understood meaning in a particular field. *Conde Nast Publications Inc. v. Miss Quality, Inc.*, 180 USPQ 149 (TTAB 1973), *aff'd*, 184 USPQ 422 (CCPA 1975). In this case, however, the third-party registrations fail to show that "rocker" is weak or that it has a descriptive or highly suggestive meaning as applied to footwear, or that it is entitled to anything less than a full scope of protection.

To begin with, the existence of four third-party registrations hardly constitutes an "extensive number" of registrations as contended by applicant. These registrations are wholly insufficient to show that the term "rocker" has been frequently

adopted and registered as a trademark or part of a trademark for goods related to those of the registrant.

Moreover, the word "rocker" is used in all four registrations as part of composite, unitary marks. It is not clear from the marks themselves, nor is it explained, what meaning of "rocker" is conveyed by the registrations for "clothing products" or by the one registration (CLEVELAND ROCKERS) for "footwear." The word "rocker" may well have a suggestive meaning in relation to shoes but none of the registrations convey that meaning.

Even if the word "rocker" were frequently registered for a suggestive meaning in relation to shoes, or even if registrant's mark were weak, it would not automatically mean that applicant's and registrant's marks are not similar. Marks must be considered in their entirety and the commercial impressions are conveyed by the marks as a whole, including the disclaimed word in applicant's mark. The fact is, however, that in viewing the marks in their entirety, the purchasing public is more likely to rely on non-descriptive portions of a mark as an indication of source. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety.")

When the marks ARCH ROCKER and ROCKERS are compared in their entireties, giving appropriate weight to the features thereof, we find that the marks are similar in sound, appearance, meaning and commercial impression. Applicant has appropriated virtually registrant's entire mark, and that term is visually and aurally the most significant portion of applicant's mark. Although applicant's mark also includes the word ARCH, that word is descriptive of applicant's goods and of little or no significance as an indication of source. Moreover, the fact that "ROCKER" is in the singular form in applicant's mark and the plural form in registrant's mark is insignificant. Purchasers who are familiar with ROCKERS for shoes are likely to remember that word upon hearing or seeing applicant's mark ARCH ROCKER at a different time on identical goods.

This is particularly likely considering that the marks also have a similar meaning in relation to shoes, a meaning which is enhanced by the addition of the word ARCH. The term ARCH ROCKER suggests a shoe with a special device or insert for foot comfort or support.<sup>4</sup> This is one of the meanings imparted by ROCKERS as well. Purchasers may well assume that ARCH ROCKER identifies a special line of ROCKERS shoes rather than a different source for the shoes.

In view of the foregoing, we find that consumers familiar with registrant's shoes sold under its ROCKERS mark would be likely to believe, upon encountering applicant's mark ARCH ROCKER for the identical goods, that the goods originated with or are associated with or sponsored by the same entity.

To the extent that there is any doubt on the issue of likelihood of confusion, it is settled that such doubt must be resolved in favor of the prior registrant. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

**Decision:** The refusal to register is affirmed.

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<sup>4</sup> The Board takes judicial notice of a definition of "rocker" in *Webster's New Collegiate Dictionary* (1979) as "any of various devices that work with a rocking motion."